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Fred B. Redwine
University of Kentucky

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**TRUSTS—SALE AND REINVESTMENT OF TRUST PROPERTY
IN VIOLATION OF THE DIRECTIONS OF THE TESTATOR—
STATUTORY INTERPRETATION—KELLY v. MARR**

In the recent case, *Kelly v. Marr*,¹ real estate was devised in trust, one-half interest to be held for A and one-fourth interest each for B and C. Each devisee was to hold during life the net income from the real estate to be paid in the stated proportions. It was further provided that the interest devised to A should pass, upon his death, in fee simple, per stirpes to his issue, if any, surviving. Should there be no issue, then to pass to the other named devisees in equal portions, to be held in trust during their lives, then to their issue per stirpes, they to take in fee simple, with like provisions as to remainders in respect of the shares devised to B and C. In the same clause of the will there was a provision that:

“Neither my said trustee nor any of the above named beneficiaries during their lives shall have the power to sell, mortgage or encumber the trust property or to anticipate the income.”

Just thirteen months after the will was probated and less than three years after its execution, suit was instituted seeking a decree of sale of the devised lands. Plaintiffs were the life tenants in their own proper persons, A and B also suing as statutory guardians of their respective children, all under twenty-one years of age. The trustee was defendant. The basis stated for the sale was that the devised real estate: (1) is not susceptible of division without impairing the value of the whole, or the several interests; (2) the income from the property is and has been insufficient to keep up fixed charges against it; (3) the interests of the life tenants are consumed by necessary expenses of care and maintenance, and the interests of the remaindermen are rapidly depreciating because of insufficient income to maintain the properties in reasonable repair. The prayer was for sale and reinvestment of the proceeds. The trustee answered by admission of the allegations of the petition.

The chancellor decreed a sale by the commissioner at public out-cry, the proceeds to be reinvested by the trustee under further orders of the Court. Kelly, the appellant, was the successful bidder and the sale was approved by the chancellor. On appeal this action was affirmed.

The action was brought under a statute² providing:

“The real property or any right, title or interest in real property of a person under the age of twenty-one years . . . may be sold under or by a decree of a Court of Equity . . . for any purpose deemed by the chancellor to be necessary or proper or beneficial to such person under disability.”

and in reaching its result the Court emphasized that statute.

¹ 299 Ky. 447, 185 S. W. 2d 945 (1945).

² KENTUCKY CIVIL CODE (Carroll, 1938) sec. 489, Supp. 1945.

There was no question of interpreting ambiguous language. The testator plainly and unequivocally prohibited the sale of the property during the existence of the trust. The issue directly raised was, does the Court have the power to decree the sale and reinvestment of trust property regardless of the terms of the trust? That question was answered in the affirmative, with reliance on the statute as the source of such power. The question was before the Court for the first time under the present statute when raised in the principal case.

The result of the interpretation placed on the statute is to allow the Kentucky chancellor an unusually broad discretion in the sale and reinvestment of trust property which the settlor provides shall not be sold for a specified time.

It is probably true that there is no jurisdiction in which a testator will be able to stay absolutely the hand of the court by providing that property devised in trust may not be sold.³ Even in the absence of statutory authority, a court of equity may through its inherent jurisdiction over trusts, decree a sale for reinvestment of trust property under certain conditions, despite the prohibition by the testator.⁴ Generally, however, such a decree will issue only if the terms of the trust prove to be impossible of performance,⁵ or if the sale is necessary to prevent the destruction of the trust res;⁶ or if due to a change in circumstances, conditions exist which the testator could not have known or contemplated.⁷ Where such a variation in the terms of the trust is authorized by the court it is done, not as representing what the testator intended, but as being what he probably would have intended could he have foreseen the circumstances that have arisen. The objects will generally be accomplished as nearly according to the terms of the instrument as is consistent with the interests of the trust estate and the beneficiaries.⁸ The mere fact, however, that a change of investment would be beneficial to the beneficiaries, or to the trust estate, is not sufficient to authorize a decree in violation of the testator's direction that the property should not be sold.⁹

³ SCOTT, TRUSTS (1939) sec. 167.

⁴ SCOTT, TRUSTS (1939) sec. 190.4.

⁵ Banker's Trust Co. of N. Y. v. Greims, 108 Conn. 259, 142 Atl. 796 (1928).

⁶ Dallas Art League v. Weaver, 240 Ala. 432, 199 So. 831 (1941); Scriter v. McWard, 328 Ill. 462, 159 N. E. 799 (1928); Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523 (1898); In re Rothwell's Estate. Rothwell v. Rothwell, 283 Mass. 563, 186 N. E. 662 (1933); Fidelity Union Trust Co. v. Sayre, 41 Atl. 2d 383 (N. J. 1945). Cf. Simon v. Simon, 26 F.(2d) 530 (C.A.D.C. 1928).

⁷ Security First Nat. Bank of Los Angeles v. Easter, 136 Cal. App. 691, 29 P. 2d 422 (1934); Young v. Young, 255 Mich. 173, 237 N. W. 535 (1931); Cutter v. American Trust Co., 213 N. C. 686, 197 S. E. 542 (1938) (Variation of irrevocable trust at suit of settlor).

⁸ SCOTT, TRUSTS (1939) sec. 167.

⁹ SCOTT, TRUSTS (1939) sec. 167; RESTATEMENT, TRUSTS (1935) sec. 190, comment (F). See Farmers & Merchants' Nat. Bank of Los Angeles v. Reed, 91 P. 2d 944 (Cal., 1939).

Trust instruments may be placed in three classes as regards authority to sell the trust property:

1. The trustee is given a power of sale.
2. The instrument is silent on the subject of selling the property and the trustee is not given a power of sale, nor is there a direction not to sell.
3. The settlor provides that the property shall not be sold.

If the trustee is given a power of sale there is no problem as he can convey good title to the property without the aid of the court.¹⁰ In both of the other classes, however, a sale if made must be authorized by the court, but ordinarily a decree will issue on less provocation where there is a mere failure to give a power of sale than where there is a direction that the property shall not be sold.¹¹ The principal case leaves no opportunity for such a distinction. While the general allegations of the plaintiff were broad enough to satisfy the requirements of a stricter jurisdiction, the proof and the facts relied upon by the Court were to the effect that after paying fixed charges there was little or nothing left for distribution and further that because of the inflated market a sale and reinvestment *could* result in the purchase of land better adapted to the growing of the principal crop, burley tobacco.¹² The substance of these facts is that it was not necessary to sell the trust property but that a change of investment might be of advantage to the beneficiaries. There was no indication that the condition of the real estate market had changed in any way since the death of the testator.

In a later case¹³ a decree for sale of real estate for reinvestment, at the suit of the life tenants against infant contingent remaindermen then in being, was affirmed although no facts were alleged or proved to show that such a change in investment would benefit the remaindermen on the ground that section 489 of the Code authorized the chancellor to decree a sale and reinvestment for any purpose which he deemed *necessary or proper* and that the statute does not require a showing that the sale be beneficial to the remainderman or reversioner. This is an extension of the authority recognized in *Kelly v. Marr* and apparently arises from the wording of the statute

¹⁰ SCOTT, TRUSTS (1939) sec. 190.

¹¹ There obviously can be no holding on this point but cf. *Orr v. Orr*, 197 Ga. 866, 30 S. E. 2d 900 (1944); *McBride v. Bullard*, 4 S. E. 2d 149 (Ga. 1939); *Wingard v. Hennessee*, 206 S. C. 159, 33 S. E. 2d 390 (1945); *Kirton v. Howard*, 137 S. C. 11, 134 S. E. 859 (1926) in which sale was not prohibited with cases in notes 5 & 7 *supra* in which sale was prohibited by the trust instrument. This distinction is recognized by statute in Connecticut (*Colonial Trust Co. v. Brown*, 105 Conn. 261, 135 Atl. 555 (1926); Gen. St. 1930, sec. 4835). It should be mentioned that while the principal case involved a decretal sale there was no attempt made therein to distinguish decretal sales from private or public sales by the trustee.

¹² 299 Ky. 447 at 450, 185 S. W. 2d 945 at 947.

¹³ *Poindexter v. Brumagen*, 301 Ky. 699, 192 S. W. 2d 960 (1946).

"for any purpose deemed by the chancellor to be necessary or proper or beneficial to such person under disability" and any one of these, "necessary," "proper" or "beneficial" seems to be sufficient to authorize the chancellor to decree a sale without too much emphasis being placed on the last phrase of the statute "to such person under disability."

The only deduction to be made is that Kentucky is a liberal jurisdiction for decretal sales of trust property whatever the expressed intention of a testator may be. There seems to be no reasonable assurance that a remainder beneficiary after a life tenant will receive the particular property devised in trust. It is questionable, however, whether Kentucky's position was appreciably altered by the Code amendment referred to. An act¹⁴ dealing specifically with trust property provides for the sale of any interest therein when it is found by the chancellor to be beneficial to the beneficiaries. While the statute does not expressly refer to property which the testator directed not to be sold, it was treated as if it did so by the Court. In *Rousseau v. Page's Executrix*¹⁵ land was devised in trust for certain life tenants with remainder over under a provision that one of the life tenants could not sell his interest. In affirming a decree for sale and reinvestment on the ground that the life tenant and the remaindermen would be benefitted thereby it was held that a restraint on the sale by the life tenant does not bind the chancellor. In *Consolidated Realty Co. v. Norton's Trustees*¹⁶ the trustee was authorized to sell trust property contrary to restrictions in the trust instrument based upon facts being proved to establish that the sale was in the interest of the beneficiaries.

Since the Code amendment¹⁷ was construed to include trust property there is perhaps little need remaining for the Act of 1882¹⁸ but it seems that the Kentucky Court has always been more inclined to encourage the sale and reinvestment of trust property than have other courts and that the decision in *Kelly v. Marr* is a re-emphasis of that position rather than a variation brought about by statute.

FRED B. REDWINE

¹⁴ Referred to as Act of 1882, found in KENTUCKY CIVIL CODE (Carroll, 1938), after sec. 491.

¹⁵ 150 Ky. 812, 150 S. W. 983 (1912).

¹⁶ 214 Ky. 586, 283 S. W. 969 (1926).

¹⁷ KENTUCKY CIVIL CODE (Carroll, 1938) sec. 489.

¹⁸ This statute authorizes private sales by the trustee subject to approval by the court. It is, therefore, probably valuable in cases where a private sale by the trustee is more advantageous than a decretal sale would be.